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SUPREME COURT.

APPEAL OF HENRY J. WILLIAMS.

ADDITIONAL BRIEF OF APPELLANT.

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HENRY J. WILLIAMS, Appellant, *vs.* THE LIBRARY COMPANY OF PHILADELPHIA, Appellees.	SUPREME COURT. No. 1. July Term, 1871. IN EQUITY.

ADDITIONAL BRIEF OF APPELLANT.

The Law and the nomenclature of the Appellees are novel and unknown, heretofore, in any Court of Justice, Law Report, or Text-Book.

We are told that a trustee may "*bind his discretion*" in one of three ways: (1) "By corrupt motives;" (2) "By motives personal to himself;" (3) "By the highest and best motives;" and that the "discretion must be an existing one, unfettered and not bound;" and that the trustee, in this instance, has so bound his discretion in advance, and is incompetent to act at all, even in the expenditure of the money in the erection of the building when the site has been fixed.

The Testator himself, they say, has "bound" his own executor's discretion so irrevocably, that neither the executor's mind or will, nor the power of any court, or, indeed, any human power, can break the bonds; and the testator's chosen, life-long friend must be set aside, and the will be executed by a Master in Equity. To justify such a monstrous result, there ought to be very clear law and indisputable right.

The phrase or thought, that a trustee may "so bind that "discretion in advance, that when the occasion arises for "its exercise it shall be taken to be non-existent," has never been used, or suggested anywhere, at any time, by

any lawyer, or judge, or text-book writer. Such a possibility has never been spoken of by them, or ever invoked as a ground for equitable interference. They nowhere speak of a "discretion being bound." They nowhere ask if he has bound his discretion, or set him aside because he has not an "existing and unbound" discretion. The only question ever asked is, "Whether the trustee has exercised his discretion *bonâ fide* for the end designed, or is so doing?" If he has not, they set aside his action as a "fraud on the power," or restrain him from the improper exercise of the power, and command him to execute it for the purpose for which it was created. But until the exigencies of the present case required it, the idea or the doctrine, that a promise, no matter how corrupt the motives may have been, to exercise the discretion or power for purposes foreign to the true end for which the discretion or power was to be exercised, *ipso facto*, disqualified the trustee from ever acting, and that he must be set aside, never was conceived in human brain, or uttered by human lips, or written in words.

No case has been cited, or can be, for such a position. Nor can one be produced, where the Court set aside the improper exercise of the discretion or power, or restrained it, and then itself exercised the discretion or power through a Master. The cases of the females "starving for matrimony," alluded to by the Appellees, were those in which the trustees refused to act, not where they had a "fettered" or "bound" discretion.

We propose to justify these positions by critically examining all of the cases cited by the Appellees. In their argument, they vaguely speak of having *selected* some of the cases which support their doctrine, which has been well called "novel" and "subtle." We may safely assume that the *selection* embraces those cases which make most strongly for them; and if their strength is weakness (as we think will appear) how great is that weakness!

The true doctrine as to "a fraud upon the power" is no novelty. The earliest case cited is that of *Alleyn* v. *Belcher*, 1 Eden. 132 (1758).

Here was "a *power to his nephew to make a jointure on any woman he should thereafter marry for her life*, in bar of dower, with powers to provide for younger children," &c.

The power was executed in favor of the wife, but with an agreement that the wife should *only receive a part as an annuity for her own benefit*, and that *the residue should be applied in payment of the husband's debts.*

It was held that this was "a fraud upon the power," and the execution was set aside except so far as related to the annuity. Lord Keeper Henley says: "The whole "transaction is an agreement between husband and wife. "No point is better established than that a person having "a power must execute it *bonâ fidê for the end designed*, "otherwise it is corrupt and void. The power here was "intended for a jointure, *not to pay the husband's debts.* "The motive that induced Edmund to execute it was *not a provision for his wife.*"

In other words, there was a fraudulent agreement and design to pervert the use of the power, and give the property for an entirely different purpose than that for which the power was conferred. There was no intention, *bonâ fidê*, to execute the power *for the end designed;* but, on the contrary, it was used for an end that was *not designed.* And this was clearly proved. Both in the argument of counsel and in the opinion of the Court, the case is put upon the distinct ground of fraud, the *absence of all intention* to execute the power *bonâ fidê.* It is nowhere said or intimated that the agreement, *ipso facto*, disqualified. It was the actual exercise of the power under the fraudulent agreement to accomplish an end foreign to its purpose which vitiated the execution.

McQueen v. *Farquhar*, 11 Vesey, 467, 480 (1804). Though a party is not permitted to execute a power for his own benefit, as against other interests, the Court will

not act against the title upon a mere suspicion that a transaction was of that nature; appearing fair both upon the instruments and the abstracts; namely, a purchase under the execution of a power of appointment by a father, subject to estates for life in him and his wife, in favor of their son, all three joining, and receiving the money, the fair value, which is presumed to be received according to their interests in the estate, and the purchaser not being bound to see to the application.

It is in this case Lord Eldon says: "It is truly said, "this Court will not permit a power *for his own benefit.* "In Lord Sandwich's case, a father, having a power of "appointment, and *thinking one of his children was in a* "*consumption*, appointed in favor of that child, and the "Court was of opinion that the *purpose was to take the* "*chance of getting the money as administrator of that child.*" He then proceeds to say that he cannot, in order to bring the present case within the principle of the act, proceed upon mere suspicion.

Note 5 to this case is as follows: "That an appoint- "ment, which, however ingeniously devised, is, in fact, "*a scheme corruptly concocted to further the selfish interest of* "*the party to whom the power of appointment is given, will* "*never be allowed to stand.* See note 4 to Hockley *v.* "Manley, 1. V. 143; and note 4 to Boyle *v.* The Bishop of "Peterborough, 1. V. 299."

Here we have the same principle. The party must, in good faith, use the power for the *purpose designed*, and not for his own benefit. But it is not intimated that the fraudulent purpose itself disqualified. It was the *acting* under it and carrying it out which was the fraud on the power.

Dummer v. *The Corporation of Chippenham*, 14 Vez. 245 (1807). The appointment of a schoolmaster was in the bailiff, and the majority of the burgesses of the corporation. The complainant was elected and held the office for many years. By a resolution adopted by a majority, he

was displaced on the alleged ground that he was unable to fulfil the duties by reason of bodily disease and the infirmities of age. He averred that this was not the true reason, which was because of resentment and party spirit against him, because of a vote he had given, and that the house he occupied might be given to another who would vote as the majority desired.

Five of the defendants demurred to the bill. The demurrer was overruled.

Lord Eldon says (251): "The principle upon which "this case was argued goes this length; that, if it could "be made out by discovery from each of these persons, "supposing no combination in the answer, that they "turned out the schoolmaster, *not upon any well-founded* "*opinion*, but *influenced by a corrupt motive*, that discovery "should be shut out." Again (252): "A corporation, as "an individual, with such a power over an estate devoted "to charitable purposes, would, in this court, be compelled "to exercise that power, *not according to the discretion of* "*the court, but not corruptly.* A trustee of another de- "scription, a corporation, or an individual, cannot be per- "mitted to *act corruptly in the execution of the trust.*" Again (253): "Then these five individuals, in the execution of "their *corrupt purpose*, found the means (for that is the "substance) of making the corporation the instrument of "dismissing him."

The true principle is again stated. The Court is not to exercise the discretion. The trustees must do it, but "not corruptly." They must act upon a "well-founded opinion." There is no intimation that even this corrupt agreement disqualified the burgesses from acting in the premises. And Lord Eldon more than intimates, that the Court would not undertake to choose the schoolmaster.

Daubeny v. *Cockburn*, 1 Merivale, 624 (1816). Voluntary settlement in trust for such one or more of his children as the settlor shall appoint. Appointment to one child exclusively, upon *a secret understanding*, that that child

shall reassign a part of the fund to or in favor of a stranger. This is a fraud upon the settlement, and void *in toto*.

Sir William Grant so decided on the authority of the cases of *Lane* v. *Page*, Amb. 233 ; and *Alleyn* v. *Belcher*, 1 Eden. 132.

The purpose of the power was to benefit all the children. Here the agreement was not to do this, but to benefit an entire stranger. There was an actual carrying out of this corrupt agreement to defeat the very purpose of the power.

Campbell v. *Home*, 1 Younge and Collyer, 664 (1842). Where a married woman who had four children, executed a power of appointment in favor of one to the exclusion of the others, the court refused to set it aside. Vice Chancellor Shadwell says : "It is quite true that this, as "well as every other transaction, may be affected by "some possible fraud, or mistake, or misconduct; but "where is the fraud, or mistake, or the misconduct here?" "If it can even be shown that this deed was executed from "improper motives, those who are interested in doing so can apply to set it aside."

The same principles are recognized. It must be proved that the party is *actually doing*, or *has done*, what will defeat the end designed. It is not enough to suspect or allege, it must be established that there is not good faith.

Beloved Wilkes's Charity, 20 Law J. Rep. (N.S.) Chancery, 588 ; 7 E. L. and E. Rep. 73 ; 3 McNaughton and Gordon, 440, (1851). This was real estate left to trustees, the rents of which were to be appropriated to the maintenance and education of a lad at Oxford, in order to make him a minister of the Church of England. The incumbents of certain parishes and their successors were to select such lad as the trustees should think eligible out of these parishes, but if none therein were eligible, then from any parish in England or Wales.

The trustees selected J., a stranger to these parishes. The father of G., who lived in one of the parishes, prayed for a new election on the ground that his son was eligible and had been rejected because the trustees "had laid down "an arbitrary exclusive rule, namely, that the sons of "farmers were not persons in a station of life fit to be the "objects of this charity." This was denied, and the court say that there was no proof of it.

Lord Chancellor Truro says (83): "In all such cases "there must be an entire absence of indirect motive; there "must be *honesty of intention*, and there must be *fair con-* "*sideration of the subject*, and if the trustees do judge and "do fairly consider, it is to *their* discretion the execution "of the trust is confided, and the duty of supervision on "the part of the court, is as to *the honesty and integrity* and "*fairness* with which they deliberate, and not with respect "to the accuracy of their conclusion."

This is the whole law of the case. As to its correctness there cannot be a doubt. But what color does it give to the extravagant and novel position assumed in the case before the Court?

It is confessed, that with Mr. Williams there is no "indirect motive"—that he is honestly endeavoring to exercise his discretion. His answer and his ten reasons for his action, show that he has given a "fair considera- "tion of the subject:" and such being the fact, it is to his "discretion the execution of the trust is confided." The duty of the Court is only "as to the honesty, and integrity, "and fairness with which he deliberates." These have been all found by the Master and the Judge at Nisi Prius.

There is no suggestion by Counsel or Court in Beloved Wilkes's case, that, because the parties who had made the selection had acted upon a false or mistaken notion, *ipso facto* they became disqualified and were forever after incompetent to act, and as the Appellees say of Mr. Williams, "a Court of Equity cannot absolve them!"

The father of G. did not ask that the Court through a

Master should select. He asked that their selection should be set aside; and that they, being admonished by the Court that their peculiar notion about farmers' sons was wrong and must be disregarded, should actually disregard this notion and again make their selection.

Precisely in this way Judge Strong advised Mr. Williams, and he swears that he did exercise his discretion, irrespective of his promise.

Wellesley v. *Earl of Mornington*, 1 Kay & Johnson 143, (1855). Under marriage settlement made in 1812, previous to marriage, the Earl of Mornington had a power of appointment among the children. The mother died. There were three children, viz., Viscount Wellesley, James Wellesley, and the plaintiff.

On November 2, 1850, the Earl appointed £27,000 to James and £9000 to the plaintiff.

On October 23, 1851, James died intestate and unmarried, and letters of administration on his estate were granted to the Earl.

The bill was filed to set aside the appointment, and charged, that before the date of the execution of the deeds "it was well known to the Earl, as the fact was, that "James's life had been and was despaired of by his medical "advisers and attendants, and that his recovery was hope-"less; that the deeds were intended to be, as they were, "in fact, concealed until after the death, which was then "shortly expected, of James; and that they were executed "by the Earl for his own benefit and advantage, and in "fraud of the power, and *not for the benefit or advantage* or "*with any regard* to the interests of his younger children, "or either of them."

"The Earl by his answers put in issue all the matters "charged in the bill, and stated as his motive for executing "the deed of November, 1850, that, having reason to fear "that James might continue in an infirm state of mind "and body, he was anxious that such a provision should "be made for him as would enable him to live in comfort;

"and that he had the best reason to believe that the "plaintiff would be well provided for, independently of "the portion moneys; and he submitted, that, in executing "the deeds, he exercised a discretion which he was entitled "to exercise under his marriage settlement."

Vice-Chancellor S. W. Page Wood says (154): "The "case, therefore, must certainly be rested—and it is painful "that it should be so rested—upon the *ground of fraud* "on the part of the parent: I mean not simply upon the "ground of the appointments not being for the child's "benefit, but upon the *broad ground* that the parent ex- "ecuted those appointments, *not with any intention* of "benefiting the object of the power, but to *secure to him- "self* the benefit that might result from the appointments "so executed." (157): "The case must rest on as high "ground as that, and I put it as high as that. I ask, can "anybody, if this case were before a jury, suppose that the "defence which is made would be a satisfactory answer, "with reference to an appointment to a person in this "imbecile condition—a lunatic who was in a weak and "infirm state of health, brought on by his excesses? The "father had been informed throughout that the weakness "and infirmity of his son's health were so occasioned; and "having made due inquiries at two previous periods as to "the state of his health, he makes no inquiry at the time "when he is about to execute these deeds. Can I believe, "or will anybody believe, that this was done for the pur- "pose of paying the supposed amount of debts, £3000 or "£4000, when we find an appointment made of £27,000, "and when one observes (which is of considerable import- "ance) the course which was taken after the appointment "was made."

He then adverts to the concealment of the deeds until after the death, their non-production until the Earl had found that James had left no will; and also to the fact, that the Earl had said in his testimony, that he heard James had, before his lunacy, made a will which gave all

his estate to his mistress. "I confess that it is one of the "most extraordinary statements in this case, that Lord "Mornington, believing his son's debts to be only £3000, "did, to the detriment of his daughter, Lady Victoria, "appoint to him in this state £27,000, in the belief that "the surplus would go to a woman with whom his son "had been living. Anything more monstrous and in- "credible was never stated in a court of justice!"

(See also the quotation on Appellees' Paper-Book, p. 9.)

Here we have again the enunciation of the same old principle, that the power must be exercised for the end designed. The end was the benefit of the children. The proofs were overwhelming that the end for which this heartless, corrupt, and vile father executed his power was *his own benefit*, not his children's.

It is true, he denied it under oath. But his oath was *absolutely overthrown* by the evidence. His own account of his reasons for his action was absurd and "monstrous." It was a case which fairly reeked with the most shameful and barefaced fraud.

And we are told, that, because the Court went behind Lord Mornington's oath and convicted him of perjury, therefore this Court may go behind Mr. Williams's oath and convict him—of perjury? Oh no! not that, but of imbecility! He cannot know whether the Broad and Christian Street lot is the best place to put Dr. Rush's Library on or not, because he promised to put it there! Lord Mornington's case and that of Mr. Williams are as dissimilar as night and day.

Marsden's Trust, 4 Drewry 594 (1859). A married woman, having a power of appointment of a fund among her children, appointed the whole fund to her eldest daughter, in order that thereout the daughter should benefit her father, but the daughter was not informed of her mother's intention until after her mother's death. The appointment was held *void*.

"It appeared that Mrs. Martin, wishing to make a

"better provision for Mr. Martin than was contained in "their marriage settlement, in case of his surviving her, it "was proposed that she should make her will in the exer- "cise of the power of appointment contained in the in- "denture of 14 October, 1836, and should leave the whole "property to her eldest daughter, Isabel C. Martin, on con- "dition that she should, on attaining her majority, make "over to her father one-half of the property, and give "him a life interest in the other half. Having been "advised that this arrangement could not be carried out, "Mrs. Martin, on the 24 July, 1857, executed a deed "poll, appointing the Canal shares to her eldest daughter "Isabel C. Martin, absolutely."

"It appeared that the intention of Mr. and Mrs. Martin "was, that Mr. Martin should, after the death of Mrs. "Martin, inform the daughter of the object to effect "which the appointment had been exercised in her favor, "leaving it in the discretion of the daughter to carry out "her mother's intention. It was admitted that Isabel C. "Martin was entirely ignorant of the execution of the "appointment in her favor till after the death of Mrs. "Martin."

Again we have the old principle re-affirmed. There must be a *bonâ fidê* intention to accomplish the end designed. Here the object of the power was the division of the property among the children according to their several needs as determined by the discretion of the mother. *Confessedly*, she exercised no discretion at all, and appointed, *not* for the benefit of the children, but of her husband. This was not the purpose of the power, and was in fraud of it. But there is no talk of a "discretion being bound," or a "free discretion," or a "fettered discretion," or any of the like phrases which sparkle in the paper-book of the Appellees. The Vice-Chancellor says: "defeating the purpose of the trust;" "it has been exercised in such a way as to defeat the purpose for which it was given." We invoke the careful consideration of the

Court to the opinion of the Vice-Chancellor as quoted on the Appellees' paper-book, pages 11 to 13. The real doctrine is there stated. But it contains no such subtile notions as they seek now to create and graft on to the original law.

Arnold v. *Hardwick*, 7 Simons 343. If the donee of a power appoints the fund to one of the objects of the power, under an understanding that the latter is to lend the fund to the former, although on good security, the appointment is bad.

Vice-Chancellor Shadwell says: "If there was any "antecedent bargain between the father and his sons, "that, if the appointment were made, the fund should be "lent to the father, the appointment would not be good."

The object of the father's appointment was not the benefit of the children, but that he might have the use of the money. There was no *bonâ fidê* exercise of the power at all.

Jackson v. *Jackson*, Drury Irish. Ch. 91. A father appointed to one child with an agreement that he himself should have a part of the fund.

Here again there was no exercise of discretion at all with reference to the objects who were to be benefited. But, on the contrary, a corrupt bargain to alienate a portion of the fund to one for whose benefit it was not given. It was not a "fettered" discretion, or a "trammelled" discretion, or a "bound" discretion. It was bad faith. It was defeating the purpose of the power.

These are all the cases cited by the Appellees, except the Duke of Portland's Case, which will be considered presently.

In each case where the Court interfered, it was because there had been no *bonâ fidê* exercise of the discretion or power for the end for which it had been given, or there was distinct proof of fraud. *And in no one of them did the*

Court venture to exercise the power or discretion itself. Nor did they ever intimate that the *mere unlawful promise*, or *understanding*, or *purpose* disqualified. It was because the party *acted* on the unlawful promise, understanding, or purpose. In other words, the true and only inquiry was, "Did the party exercise the power or discretion *bonâ fidê*, honestly, with a sincere desire to fulfil the purposes of the power or discretion—the end for which it was given?"

No one of these cases gives even the faintest color to the peculiar views of the Appellees. No one of them says that the apppointor is to have a *free*, *untrammelled*, *unbiased*, *unfettered*, *blank* mind. An honest intention to accomplish the purposes designed by the power is all that it required. It is confessed, by the Appellees, because incontestably proved, that Mr. Williams has this good quality.

Topham v. *Portland*, 31 Beavan 525; 11 House Lords 32; De Gex, Jones & Smith 516; 5 Law Rep. Eq. Ap. 49. Does this case introduce any new rule? Not in the slightest. It is, however, the *one* case and the *solitary* one upon which the Appellees rely. They confess that Mr. Williams does not come under the ban of their first two "ways by which a discretion may be bound," viz., (1) "corrupt motives; (2) motives personal to himself." He is disqualified or bound by (3) "the highest and best motives!" And on page 15 of their argument, under this last head, the Duke of Portland's Case alone furnishes the law. It stands the only beacon light on the shores of the Law's wide sea, to warn trustees actuated by "the highest and best motives imaginable," that they may be shipwrecked, and become castaways from the vessel intrusted to their care.

We aver that it does not assert or contain a single new principle—that neither in the argument of counsel, nor in the many opinions of the Court, is there a syllable about a "discretion being bound," or of a "free, untrammelled," "unbiased" discretion; or that an unlawful promise, or understanding, or purpose, *ipso facto*, disqualifies; or that,

such unlawful promise or understanding once having been discovered and confessed, the appointor thereby became so tainted that he never could afterwards act, and must be restrained, and the Court must act for him through a Master.

The old principle which decided the case was precisely the same, no more, no less, recognized by Lord Keeper Henley in 1758, who then said "no point was better established," viz., "that a person having a power must execute it *bonâ fidê* for the end designed." The end designed in the Duke of Portland's Case was, to distribute the fund between Lady Mary and Lady Harriet, in the exercise of a wise discretion, according to their respective wants and circumstances at the time of the use of the power. This, and this alone, was the purpose, the end, the object of the power as expressed in the deed creating it.

Did the second Duke of Portland do this? No. "The appointment of the two sums of £16,000 were made to him (Lord Henry) on the faith that Lord Henry would act in the matter as his father desired." He confessed that he had promised, before the creation of the power (see 31 Beav. page 536), his father, that he would use his power of appointment so as to prevent the marriage of Lady Mary and Colonel Topham, that he was a mere "dummy" in making the appointment, and that Lady Harriet agreed to take but half of the fund for herself, and hold the other half for Lady Mary, so as to carry out the promise made by her brother to her father in order to prevent her marriage to Col. Topham. The Master of the Rolls (Romilly) says (31 Beav. 536): "The only question "respecting which any reasonable doubt can be enter- "tained is, whether the appointment was or was not "wholly void, on the ground that it was made to effect "an object foreign to the purpose for which the power "was created?" He held the object was foreign to the purpose for which the power was created; but in no place does he so much as intimate, that the *mere promise* and *understanding* between father and son *in itself* disqualified.

It was the *acting on it*, and his *confessing he had exercised no discretion*, but was a mere "dummy," which vitiated the appointment.

The Lords Justices on Appeal (De Gex, Jones & Smith, 517) held precisely the same views. "The *motive* with which the power was exercised may not be regarded, *the purpose may*."

On appeal to the House of Lords (11 House of Lords' Cases, 32) Lord Chancellor Westbury says (53): "The ap- "pointor shall at the time of the exercise of that power, "and for any purpose for which it is used, act with *good* "*faith and sincerity*, and with an entire and single view to "the *real purpose and object of the power*, and not for the "purpose of accomplishing or carrying into effect any bye "or sinister object which he may desire to effect in the ex- "ercise of the power." "The *faithful, sincere, just and honest exercise of the power*." Lord Cranworth and Lord St. Leonard's opinions were to the same effect.

But there was no talk of the discretion being "bound," or "trammelled," or the like; or that the appointments were set aside *because* of the promise; or that the promise by the Duke to his father itself disqualified him from exercising the power. On the contrary, whilst setting aside the appointments, they expressly modified the decree "in "order to prevent the decree being used hereafter as an "argument that will bar any attempt to exercise the power "by the Duke." When Lord Westbury suggested this, it never occurred to the Attorney-General (Sir Roundell Palmer), to reply that Lord Henry's "*discretion was bound*," and that so firmly, that neither he nor any Court of Equity could absolve him from the bond, and therefore it was "idiotic" to make such alteration in the decree! It was reserved for the Counsel of the Appellees to discover this novel and subtile doctrine.

On the contrary, the learned Judges all recognized his *right and power to act*, although his discretion was "bound," and "fettered," and "trammelled," by his promise to his

father, welded all the stronger in the heats of an angry and protracted litigation. And he did exercise the power, *unquestioned on this ground.* And when new bills were filed to set aside this new exercise of his "bound" and "fettered" discretion, it never occurred to the distinguished counsel for Lady Mary to take the novel ground of the Appellees, that she was entitled to the *free* and *untrammelled* judgment of the Duke; that he must be as unbiassed as a *judge* or *juror*, and not being such he all along had been and still was disqualified to exercise the power; or that Lady Harriet having once been a party to the family compact to "starve for matrimony" Lady Mary, she too was so tainted with this original sin that there could be no redemption for her either from its withering power!

No, they neither put it in the bill, nor ventilated such an extraordinary doctrine in their arguments. Nor did the learned Judges who decided it. On the contrary, the latter distinctly recognized the Duke's *right* and *power* to appoint, and Lady Harriet's to receive and hold. They said, you could have appointed, and Lady Harriet could have received; but you did not do anything to remove the transaction from its original position. "I think a valid appointment might have been made to her of that fund." Lady Harriet's testimony showed plainly, that she considered herself still absolutely controlled by the old family arrangement.

Lord Hatherly says (5 Ch. App. 57): "If the Duke, "truly preferring Lady Harriet, either on the ground of "her sister's supposed disobedience to her father's wishes "in her marriage, or for any other reason, however capri- "cious, intended simply to give the property to her in pre- "ference to her sister, *he is by the powers authorized to do* "*so.*"

Vice Ch. James says (5 Ch. App. 49–50): "I hold that it "was necessary in order to set it right, that something "should have been done and said, clearly, unambiguously, "and sufficiently, to disconnect the new appointment

"from the old understanding—from the old purpose—
"from the old influences—which rendered the old appoint-
"ment illegal and void, and that merely executing a new
"deed, sending a dry, formal, official, lawyer's letter to the
"appointee, informing her of the new appointment, and of
"the legal effect of the instrument, were not sufficient for
"the purpose."

He also says (page 50): "Nothing was said or done be-
"fore or at the time of the new appointment, to get rid of
"the effect of what had been so said by the Duke, and
"agreed to by her."

Lord Hatherly (page 57–8) says: "Has he taken any step
"whatever to discharge her from it (her sense of moral
"obligation) and restore her to complete freedom of action?
"He does not say he has done so."

And on page 58, he continues: "Does not Lady Har-
"riet describe herself as a mere instrument to carry into
"effect the will of the Duke, whom she believed to be the
"depositary of her late father's wishes on the subject? Is
"this difficulty removed by the Duke's statement that
"there is no agreement, that he has no hope or expecta-
"tion on the subject of his sister's dealing with the moiety
"of the fund in dispute; and is it not necessary that she
"should be wholly freed from the notion that she is under
"any moral obligation whatever to observe the Duke's
"wishes? It is not for the Court to point out *how* this
"may be done, after all that has passed?" But implying
that it *could* be done.

L. J. Giffard says (page 60): "In this state of circum-
"stances, no new appointment by the Duke of Portland—
"the same donee—in favor of Lady Harriet Bentinck—
"the same appointee—can stand unless the effect and in-
"fluence of this previous arrangement can be proved to
"have been so obliterated as to have put the donee of the
"power on the one hand and the appointee on the other in
"the same position as though no such arrangement had
"been brought about."

And on page 62: "Where an appointment has been set "aside by reason of what has taken place between the "donee of a power and an appointee, a second appointment "by the same donee to the same appointee cannot be sus- "tained otherwise than by clear proof on the part of the "appointee that the second appointment is perfectly free "from the original taint which attached to the first."

Is not all this strange language for Judges to use, if they held the notions of the Appellees, that, once having promised, or being under a moral obligation, there could thereafter be no possible cleansing from the taint? the disqualification became eternal, and could have no absolution! They held to no such concentration of wisdom!

Suppose Lord Henry had gone to Lady Harriet after the first appointments had been set aside, had taken his counsel and hers with him, and had told her just what the Judges had said—that, whilst he would like very much to have carried out his father's wishes, he found that neither he nor she could do so by means of this power—that in the exercise of his discretion for the ten reasons he then enumerated, he preferred her to her sister, and he meant to give her the whole fund—that she was to blot out from her mind all that had occurred, and use the money just as she in her own free judgment chose, irrespective of her father's wishes and his—and that then he had made the appointment of the whole fund to Lady Harriet, and she agreed to this; and that when examined under oath, he and she had testified so truthfully, that even their opponents had been forced to say they believed they had acted honestly:—can there be a doubt, but that his second appointment would have been sustained as good?

Precisely this has been done in Mr. Williams' case. Judge Strong advised him thus: "In the exercise of the "discretion reposed in you by that instrument (the will), "you may regard Dr. Rush's views and wishes orally ex- "pressed; but after all *your* judgment, however it may be

" made up, must be your guide in matters left to your dis-
" cretion."

Mr. Williams swears: " After Dr. Rush's death, I was " obliged, of course, in order to assume the duties of exe-
" cutor, to take the ordinary oath, which obliged me to " carry out the directions of the will. This was a legal, " as well as a moral obligation: and under it, I did then, " and have done ever since, considered the question as to " the site of the Library, entirely irrespective of any " promise made to Dr. Rush, or of any wish expressed by " him, and I became then, and have continued ever since, " convinced, according to the best judgment I am able to " form, that this lot possesses advantages which are at-
" tainable in no other with which I am acquainted." " I " believe that if I had made no promise, and had not known " the wishes of Dr. Rush, my judgment would have been " the same."

Neither Lady Harriet nor the Duke of Portland so swore. She still remained a "*passive*" instrument to carry out the Duke's purpose, which was foreign to the end of the power.

Lord Hatherly says (p. 58–59): "*I rely on her (Lady Harriet) present evidence, on cross-examination, that she is still a passive instrument to effect her brother's purpose.*"

L. J. Giffard (61) says: " I am satisfied from Lady " H. Bentinck's statements in her answer and her cross-
" examination that the original influence and obligation " have existed, still exist, and are likely to exist."

If the Duke of Portland had acted as Mr. Williams has, Lady Mary's " Counsel would not have been even listened to. "

This review of *all* the cases cited and relied upon by the Appellees shows, that there is no basis anywhere for their remarkable theory about a "*bound* discretion," an "*unfettered*," "*unbiased*" discretion, that the trustee must be like a Judge or Juror. It is wholly unwarranted by any case;

and we invoke the careful consideration of the Court before it commits itself to these new dogmas.

The great and only question is one of fact, whether Mr. Williams has *bonâ fidê*, honestly exercised his *own discretion*, under a broad and thoughtful foresight, in the selection of the lot at Broad and Christian Streets? The evidence establishes this, as we have already shown in our former Brief; and thus sustains the Answer, which, on this point is responsive to the Bill, and is not contradicted by any evidence whatever.